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No. 92-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

v.

THE HONORABLE TONY LINDSAY,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

REPLY BRIEF FOR PETITIONER

MARTIN H. REDISH
Counsel of Record
KRISTOPHER S. HESTON
HOLLEB & COFF
55 East Monroe Street
Suite 4100
Chicago, Illinois 60603
(312) 807-4600

Attorneys for Petitioner,
KEENE CORPORATION

STUART E. RICKERSON
Vice President-
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166

Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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To The Chief Justice And Associate Justices
Of The Supreme Court Of The United States:

Petitioner submits this brief in reply to the numerous legal and factual misstatements made in the brief in opposition filed by Benjamin and Neona Williams, et al.

ARGUMENT

I.

RESPONDENTS LACK STANDING TO FILE A BRIEF IN OPPOSITION

Although the individuals who filed a brief in opposition to the petition for a writ of certiorari choose to label themselves "respondents," in point of fact they were not parties to the mandamus proceeding in the Texas Supreme Court below, nor are they parties to the proceeding before

this Court. They therefore have no standing to file a respondents' brief in opposition, and their brief should not be considered by this Court.

Even if this Court chooses to accept the brief in opposition, however, nothing contained in that brief should prevent the granting of Petitioner's request for a writ of certiorari. While Petitioner stands on the arguments contained in its petition, several assertions made in the brief in opposition raising new matters warrant reply.

II.

THE FILING OF THE BRIEF IN OPPOSITION DEMONSTRATES THAT THE ISSUE RAISED IN THE PETITION IS NOT MOOT

The individual parties named as respondents in the brief in opposition no longer have any interest in this case, because their claims against Petitioner have already been adjudicated. To the extent that anyone connected with the brief in opposition maintains a continuing interest in the issue, it is the attorneys for the plaintiffs in the underlying litigation, some of whom are described in the brief in opposition as "real parties in interest to the proceeding. . . ." (p. ii).

In a sense, this assertion is hardly surprising, since it is plaintiffs' lawyers in general and these lawyers in particular who have the most to gain from maintenance of the status quo in asbestos litigation. They therefore have the most to lose if this Court upholds Petitioner's First Amendment right to shine the spotlight of public attention on the waste and abuse that pervade the existing methods of asbestos adjudication.

Ironically, the very fact that the brief in opposition was filed belies its assertion that the constitutional issue raised by Petitioner is moot. If that were actually the case, pre-

sumably those who authored the brief in opposition would have had no motivation to respond to the petition. It is, no doubt, for the very reason that those attorneys know full well that the issue will once again arise on numerous occasions in the State of Texas that they deemed it necessary to respond.

III.

THE ISSUE OF THE TRUTH OR FALSITY OF PETITIONER'S ADVERTISING IS IRRELEVANT TO THE CONSTITUTIONALITY OF RESPONDENT'S INJUNCTION

The brief in opposition alleges that Keene's advocacy advertising was "false and misleading." (p. 10) While this charge is demonstrably false, and no judge has ever made such a finding, it is totally irrelevant to whether Petitioner's free speech rights have been infringed by the sweeping gag order issued by the Texas state court. Truth or falsity is wholly irrelevant to the level of constitutional protection given to Petitioner's political advocacy. As asserted in Petitioner's original brief in support of its petition and not disputed in the brief in opposition, Petitioner's advertising is not commercial speech, but rather fully protected political expression. In this area, it is not for the State to decide which expression is "true" and which is "false." Rather, as Justice Holmes told us, "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Investing judges with power to decide, *a priori*, which political commentaries are true and which are false would create a society that is very different from the one established by our Constitution.

In any event, the truth or falsity of Petitioner's political advertising is irrelevant to the constitutionality of Respon-

dent's injunction, because there was no hearing on which claims were true and which were false, and the injunction was in no way confined to so-called "false" advertisements. Rather, it prohibited *all* commentary by Petitioner on the specified subjects. Thus, even if one were to accept the constitutionally preposterous suggestion that First Amendment protection turns on the truth or falsity of political expression, Respondent's injunction would nevertheless be grossly overbroad, in clear violation of this Court's precedents. *See, e.g., United States v. Robel*, 389 U.S. 258 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

IV.

THE PROCEEDING BEFORE JUDGE WOOD IS IRRELEVANT TO THE CONSTITUTIONALITY OF RESPONDENT'S INJUNCTION

The brief in opposition expends considerable effort in describing the contempt proceeding against Petitioner before Judge Sharolyn Wood in the State District Court in Houston, arising out of Petitioner's publication of an advocacy advertisement in the *Houston Chronicle* while a jury was coincidentally deliberating in a case in which Petitioner was a defendant. (pp. 5-7; 11-12) Other than confirming Petitioner's assertion that the issue before Judge Lindsay is not unique and is therefore likely to arise again in the Texas courts, this discussion bears no relationship to the constitutional issue presented to this Court by Petitioner. It is a completely different case, with a different set of facts.

It is true, as the brief in opposition asserts, that Judge Wood found that Petitioner's advocacy advertisement republishing an editorial from another newspaper (which contravened no previously issued order by Judge Wood) violated stated procedural laws. But even if Judge Wood correctly applied state law (something Petitioner in no

way concedes), that law cannot supersede the First Amendment right of free speech. At no point did Judge Wood give even the slightest attention to the First Amendment arguments presented to her by Petitioner.

Moreover, it should be noted that Respondents knowingly misstate the facts as found by Judge Wood when they assert that "Keene . . . improperly communicated with the jurors. . . ." (p. 4) "Communicate" is defined as "to convey knowledge of or information about." Webster's New Collegiate Dictionary (1981 ed.) p. 225. However, Judge Wood specifically interrogated each juror and each juror testified that he or she had not seen the advocacy ad in question or any other media report on asbestos, in accordance with the instructions Judge Wood had given at the outset of the trial. In short, the judge employed an accepted, less restrictive approach to shielding the jurors from outside influences: she instructed them not to read or watch media reports on asbestos. It worked.

Nonetheless, at Respondents' urging, Judge Wood held Petitioner in criminal contempt without a hearing. Judge Wood's action, when viewed in conjunction with the action by Judge Lindsay in this case, demonstrates a pattern of pervasive hostility against Petitioner's free speech rights on the part of the Texas courts. Thus, the matter is not moot, as found by the Texas Supreme Court, but is "capable of repetition yet evading review."

V.

THE BRIEF IN OPPOSITION UNDERSCORES THE NEED FOR THIS COURT'S INTERVENTION TO PROTECT A LITIGANT'S FIRST AMENDMENT RIGHT TO ENGAGE IN POLITICAL EXPRESSION DURING TRIAL

Like Judge Wood in the contempt proceeding, Judge Linsday in this case evinced absolutely no familiarity with or sensitivity to the role which the First Amendment

plays as a limitation on state power to regulate a litigant's speech. When viewed together, the behavior of the two Texas States Judges presents an ominous portrait of the stature of the First Amendment in the state courts of Texas.

Indeed, the brief in opposition itself illustrates the difficulties that Petitioner has faced—and no doubt will continue to face—in asserting its First Amendment rights in the state courts of Texas. It contains numerous misstatements about the scope of litigants' First Amendment rights against prior restraints. Amazingly, it makes not a single mention of this Court's landmark decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), despite the case's obvious relevance to the constitutional claim asserted by Petitioner. Even if one were ultimately to conclude (incorrectly, Petitioner contends) that *Nebraska Press* is distinguishable from the present case, surely that decision must at least be considered and the basis of its distinction from the present case explained. Yet the brief in opposition fails even to acknowledge the case's existence. Even more troubling is the fact that neither Judge Wood nor Judge Lindsay even mentioned the case, much less attempted to distinguish it, despite the fact that both were imposing significant restrictions or penalties on Petitioner's exercise of its right to freedom of speech. Nor did either Texas appellate court to rule in this case ever discuss *Nebraska Press*.

CONCLUSION

This Court is today presented with a situation in which neither the Texas state courts nor the plaintiffs in the underlying litigation, who together have imposed substantial limitations on Petitioner's free speech rights, ever *mentioned*, much less attempted to distinguish, the best

known decision of this Court concerning the interrelation of free speech and the trial process.[1] Surely, our system has malfunctioned when such a result occurs.

It is this Court's role to intervene to remedy such malfunctions, and to assure that pervasive state violations of constitutional rights not be allowed to continue. For this reason, this Court should grant the petition for certiorari.

Respectfully submitted,

MARTIN H. REDISH
Counsel of Record
KRISTOPHER S. HESTON
HOLLEB & COFF
55 East Monroe Street
Suite 4100
Chicago, Illinois 60603
(312) 807-4600

Attorneys for Petitioner,
KEENE CORPORATION

STUART E. RICKERSON
Vice President-
General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
Of Counsel

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[1] The only court actually to have considered the relevance of *Nebraska Press* to an injunction against Petitioner's publication of advocacy advertisements during trial, the Maryland Court of Special Appeals, held such an injunction unconstitutional. *Keene Corp. v. Abate*, 608 A.2d 811 (Md. App. 1992) (reproduced in the appendix to the Petition for Writ of Certiorari, pp. 70-81).